Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

Paul A. Sims, Warren L. Pulliam, Janice L. Pulliam, Kerry W. Pulliam, Chaplin Insurance Agency, Inc., and W & J Pulliam, Inc.,

Petitioners,

versus

Ohio Casualty Insurance Company; Prudential Insurance Company of America a/k/a Prudential Financial; Prudential-Bache Securities, Inc., a/k/a Prudential Securities, Inc.; First Union Bank of Tampa, N.A. a/k/a Wachovia Bank; Barnett Bank of Tampa, N.A. a/k/a Bank of America; James O. King, Jr.; Peoples State Bank of Chaplin, Kentucky a/k/a King Southern Bank; Nelson Bancorp, Inc.; J. R. Horn a/k/a Marion A. Horn, Jr.; and United States Mortgage and Trust Company, Inc.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the trial court's Order was properly appealable.

2. Whether the RICO counts of the Plaintiffs' Complaint were time- barred.

3. Whether the appellate panel was improperly constituted.

4. Whether Defendants J.R. Horn and U.S. Mortgage & Trust Company were properly served with process.

IN THE SUPREME COURT OF THE UNITED STATES
October Term 2005
No._____

Paul A. Sims, Warren L. Pulliam, Janice L. Pulliam, Kerry W. Pulliam, Chaplin Insurance Agency, Inc., and W & J Pulliam, Inc., Petitioners

v.

Ohio Casualty Insurance Company; Prudential Insurance Company of America a/k/a Prudential Financial; Prudential-Bache Securities, Inc., a/k/a Prudential Securities, Inc.; First Union Bank of Tampa, N.A. a/k/a Wachovia Bank; Barnett Bank of Tampa, N.A. a/k/a Bank of America; James O. King, Jr.; Peoples State Bank of Chaplin, Kentucky a/k/a King Southern Bank; Nelson Bancorp, Inc.; J. R. Horn a/k/a Marion A. Horn, Jr.; and United States Mortgage and Trust Company, Inc., Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Paul A. Sims, Warren L. Pulliam, Janice L. Pulliam, Kerry W. Pulliam, Chaplin Insurance Agency, Inc., and W & J Pulliam, Inc., the Petitioners, pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit entered in the above-entitled case on October 11, 2005

OPINION BELOW

The judgment of the United States Court of Appeals for the Sixth Circuit (Appendix G) was entered on July 27, 2005; that court filed an amended judgment on October 11, 2005; that court denied the Petitioners' Petition for Rehearing on January 26, 2006.

JURISDICTION

The jurisdiction of the Supreme Court is invoked under 28 U.S.C. § 1254(i).

PARTIES

Paul A. Sims, Warren L. Pulliam, Janice L. Pulliam, Kerry W. Pulliam, Chaplin Insurance Agency, Inc., and W & J Pulliam, Inc., Inc., Petitioners.

Ohio Casualty Insurance Company; Prudential Insurance Company of America a/k/a Prudential Financial; Prudential-Bache Securities, Inc., a/k/a Prudential Securities, Inc.; First Union Bank of Tampa, N.A. a/k/a Wachovia Bank; Barnett Bank of Tampa, N.A. a/k/a Bank of America; James O. King, Jr.; Peoples State Bank of Chaplin, Kentucky a/k/a King Southern Bank; Nelson Bancorp, Inc.; J. R. Horn a/k/a Marion A. Horn, Jr.; and United States Mortgage and Trust Company, Inc., Respondents.

TABLE OF CONTENTS

JURISDICTION iii

PARTIES iii

TABLE OF CASES iv

TABLE OF STATUTES vi

TABLE OF RULES vi

TABLE OF OTHER AUTHORITIES vi

STATUTES INVOLVED 1

STATEMENT OF THE CASE 1

REASONS FOR GRANTING THE WRIT 9

CONCLUSION 26

TABLE OF CASES

American Constr. Co. v. Jacksonville, T. & K. W. R. Co., 148 U.S. 372 (1893) 17

Busby v. Crown Supply, Inc., 896 F.2d 833 (4th Cir. 1990).....20

Coal-Mac, Inc. v. JRM Coal Co., Inc., 43 F. Supp. 499 (E.D. Ky. 1990).....14

Hayduk v. Lanna, 775 F.2d 441 (1st Cir. 1985).....23

In re. Grieb Printing Co., 230 B.R. 539 (Bkrtcy. W.D. Ky. 1999).....26

Isaak v. Trumbull Sav. & Loan Co., 169 F.3d 390 (6th Cir. 1999).....15

Landry v. Air Line Pilots Ass'n, 901 F.2d 404 (5th Cir. 1990).....20

L.C.L. Theatres v. Columbia Pictures Indus., 566 F.2d 494 (5th Cir. 1978)..... 13, 15

Moody v. Kapica, 548 F.2d 133 (6th Cir. 1976)

National Elec. Benefit Fund v. Heary Bros., 931 F. Supp. 169 (W.D. N.Y. 1995) 24

Nelson v. Carland, 11 L. Ed. 126 (1843) 17

New England Health Care Employees Pension Fund v. Ernst & Young, 36 F.3d 495 (6th Cir. 2003)..... 10, 12, 15

New England Reinsurance Corp. v. Tennessee Insurance Co., 780 F. Supp. 73 (D. Mass. 1991).....25

Nguyen v. United States, 539 U.S. 69 (2003)..... 17, 18

Official Publications, Inc. v. Kable News Co., 884 F.2d 664 (2d Cir. 1989) 20

Pan American Petroleum Corp. v. Orr,
319 F.2d 612 (5th Cir. 1963).....11

Pioneer Utilities Corp. v. Scott-Newcomb, Inc.,
26 F. Supp. 616 (E.D. N.Y. 1939).....25

Schreiber Distrib. Co. v. Serv-Well Furniture Co.,
806 F.2d 1393 (9th Cir. 1986) 21

Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479 (1985).....22

Tech Hills II v. Phoenix Home Life Mutual Ins. Co.,
5 F.3d 963 (6th Cir. 1993).....26

Tobin v. Ramey, 206 F.2d 505 (5th Cir. 1953).....16

United States v. Allied Stevedoring Corp.,
241 F.2d 925 (2d Cir. 1957) 16

United States v. American-Foreign S.S. Corp.,
363 U.S. 685 (1960) 17

U.S. v. Balanovski, 236 F.2d 298 (2d Cir. 1956) 25

U.S. v. Bonnano Organized Crime Family,
683 F. Supp. 1411 (E.D. N.Y. 1988).....23

U.S. v. Davis, 38 F.R.D. 424 (N.D. N.Y. 1965).....25

United States v. Emholt, 105 U.S. 414 (1881) 17

U.S. v. Hiber, 603 F.2d 327 (2d Cir. 1979).....23

United States v. Lancaster, 5 L. Ed. 127 (1820).....17

U.S. v. Masters, 924 F.2d 1362 (7th Cir. 1991) 23

U.S. v. Private Sanitation Industry Assn.,
793 F. Supp. 1114 (E.D. N.Y. 1992).....23

William Cramp & Sons Ship & Engine Bldg. Co.
v. International Curtis Marine T. Co.,
228 U.S. 645 (1913).....17

TABLE OF STATUTES

18 U.S.C. § 1951 1

18 U.S.C. § 1[illegible] 1, 21, 22

18 U.S.C. § 1962 ..... 20, 21

28 U.S.C. § 46 (b) 19

36 Stat. 1131 17

26 Stat. 826 17

TABLE OF RULES

Rule 9(b), F.R.C.P. 23

Rule 12(b)(6), F.R.C.P. 2

Rule 56, F.R.C.P. 2

Rule 59(e), F.R.C.P. 2

CR 4.01(1)(a) 25

CR 4.04(2) 25

CR 4.04(5) 25

TABLE OF OTHER AUTHORITIES

PAUL A. BATISTA, CIVIL RICO PRACTICE MANUAL (2d ed. 1997) 20

CALVIN W. CORMAN, LIMITATION OF ACTIONS (1991) 13, 14, 15

STATUTES INVOLVED

18 U.S.C. § 1951

18 U.S.C. § 1961, *et seq.*

STATEMENT OF THE CASE

Procedural history.

This action arises out of a Complaint filed in Nelson Circuit Court on November 13, 2002 by Paul A. Sims, Warren L. Pulliam, Janice L. Pulliam, Kerry W. Pulliam, Chaplin Insurance Agency, Inc., and W & J. Pulliam, Inc. (hereafter "Plaintiffs") against the Ohio Casualty Insurance Company; Prudential Insurance Company of America a/k/a Prudential Financial; Prudential-Bache Securities, Inc., a/k/a Prudential Securities, Inc.; First Union Bank of Tampa, N.A. a/k/a Wachovia Bank; Barnett Bank of Tampa, N.A. a/k/a Bank of America; James O. King, Jr.; Peoples State Bank of Chaplin, Kentucky a/k/a King Southern Bank; Nelson Bancorp, Inc.; J. R. Horn a/k/a Marion A. Horn, Jr.; and United States Mortgage and Trust Company, Inc.[1] (hereafter "Defendants").

That Complaint alleges generally that the Defendants have violated the Hobbs Act, 18 U.S.C. § 1951, and the RICO Act, 18 U.S.C. § 1961, *et seq.*, in their settlement of action No. 88-CI-00812, Jefferson Circuit Court, *Barnett Bank of Tampa, N.A. v. Peoples State Bank, Chaplin, Kentucky,* and in their prosecution of action No. 3:90CV-0367-J, United States District Court for the Western District of Kentucky, *Ohio Casualty Insurance Co. v. Warren L. Pulliam,* and in their prosecution of action No. 93-CI-00130, Nelson Circuit Court, *Ohio Casualty Insurance Co. v. Warren L. Pulliam, et al.* The Complaint also alleges various supplemental causes of action arising under state law.

On December 13, 2002, the Defendants removed this action to the United States District Court for the Western District of Kentucky, Louisville Division, on the basis of federal question

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1. Defendants J. R. Horn a/k/a Marion A. Horn, Jr., and United States Mortgage and Trust Company, Inc. did **not** answer, plead, or otherwise respond to the Complaint. A number of the other Defendants have suggested that Horn and U.S. Mortgage & Trust were **not** properly served with process. The adequacy of that service of process is one of the issues raised upon this Appeal.

jurisdiction. Each of the respective Defendants, **except** Defendants Horn and U.S. Mortgage & Trust Co., in lieu of answering, moved the district court, pursuant to Rule 12(b)(6), F.R.C.P. and/or Rule 56, F.R.C.P., either to dismiss the action or to grant summary judgment against the Plaintiffs.

On September 12, 2003, and while the aforesaid Motions were pending before the district court, the Plaintiffs filed their First Amended Complaint.[2] On September 25, 2003, the district court issued an Order dismissing the Plaintiffs' federal counts, and remanding the state counts to Nelson Circuit Court.[3] A number of the Defendants filed timely Motions, pursuant to Rule 59(e), F.R.C.P., to Alter of Amend that Order. Those Motions were denied by Order dated July 16, 2004.

Plaintiffs then appealed to the United States Court of Appeals for the Sixth Circuit. That court denied their appeal by Order dated July 27, 2005. The court filed an Amended Order of Dismissal on October 11, 2005. Plaintiffs filed a timely Petition for Rehearing, which was denied by Order dated January 26, 2006. This Appeal followed.

Relevant facts.

The events which form the basis of this action occurred in the fall of 1986. During that time, Warren L. Pulliam (hereafter "Pulliam") was the president of Peoples State Bank, Chaplin, Kentucky (hereafter "Peoples Bank"). The Pulliam family had owned a majority of the stock of Peoples Bank since the 1950's. In 1984, Warren L. Pulliam and James O. King (hereafter "King"), the bank's C.P.A., each purchased one-half of the stock in Nelson Bancorp, which owned the bank, from Warren Pulliam's brother, E.H. Pulliam. King also purchased one-half interrest in the Chaplin Insurance Agency, Inc., from Warren L. Pulliam.

In the spring of 1986, Donald R. Tibbitts (hereafter "Tibbitts") and Ben Mirzaian (hereafter "Mirzaian"), agents of the Prudential Insurance Company of America and of Prudential-Bache Securities, Inc. (hereafter collectively referred to as "Prudential") appeared in the Chaplin area promoting a number of

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2. The Amended Complaint contained an additional count, Count XIV, which requested a declaratory judgment.

3. Nelson Circuit Court has stayed all further proceedings in the remanded action pending the outcome of this Appeal.

investment schemes. During the ensuing ten months, they sold over $1,600,000.00 of fraudulent securities in the Chaplin area.

During the course of these activities, both Tibbitts and Mirzaian opened business accounts at the Peoples Bank. On April 4, 1986, Tibbitts invested $400,000.00 of Peoples Bank's funds in Prudential securities. On April 7, 1986, Tibbitts assigned $40,000.00 to Peoples Bank as a guarantee that this investment would yield a return of at least 10%. In November, 1986, Pulliam issued certified checks in excess of $800,000.00 for Tibbitts and Mirzaian. These checks were covered by funds transmitted to Peoples Bank from Barnett Bank of Tampa, N.A. (hereafter "Barnett Bank"). These funds were secured by an irrevocable letter of credit issued by Prudential to Barnett Bank and by one million shares of common stock in Video Communications, Inc. which had been assigned to Barnett Bank by the United States Mortgage and Trust Company, Inc., which owned the stock.

On December 3, 1986, Tibbitts deposited to the account of Peoples Bank at Liberty National Bank (Peoples' correspondent institution) a check drawn on Douglas A. Murdock (hereafter "Murdock") at Barnett Bank in the amount of $460,000.00. Also on December 3, Tibbitts deposited to the same account a check drawn on Tibbitts' account at BankOne of Lexington in the amount of $275,000.00. Both of these checks were dishonored by the drawee banks for insufficient funds.

On December 14, 1986, Pulliam demanded that Tibbitts furnish security to cover the certified checks. Tibbitts thereupon caused Murdock to tender to Pulliam 1,000,000 shares of common stock in Video Communications, Inc. as collateral for Peoples Bank. This stock was assigned to Peoples Bank by the United States Mortgage and Trust Company, Inc., owners of said stock. This stock was worth more than three dollars per share on that date.[4]

On December 16, 1986, Barnett Bank wire-transferred $100,000.00 to Peoples Bank despite its knowledge that problems existed on December 3, 1986, because Barnett Bank had

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4. This represents the value of shares traded on what was then known as the "pink slip exchange, now NASDAQ. The actual value of the shares may have been much greater. The company's principal asset was a certificate of deposit, assigned to Video Communications by its parent company, U.S. Mortgage & Trust Co., Inc. drawn on the Mitsui Bank of Tokyo, Japan, and valued at $1.2 billion. Since there were 20 million shares outstanding, this stock represented 1/20th of the total number of shares. The actual value of this stock, therefore, appears to have been 1/20th of $1.2 billion, or $60 million.

dishonored the prior check of its customer, Murdock, in the amount of $460,000.00. On December 18, 1986, after Barnett Bank knew that Pulliam had been dismissed as President of Peoples Bank because of these transactions, it nevertheless wire-transferred an additional $75,000.00 to Peoples Bank. On December 19, 1986, Barnett Bank wire-transferred a further $261,000.00 to Peoples Bank.

Upon learning of the shortfall at Peoples Bank on December 16, 1986, Pulliam's associate, King coerced Pulliam to meet with him and with his attorneys James Straus and Charles F. Pritchett, Jr. (hereafter "Straus" and "Pritchett") within the next twenty-four hours. This meeting took place on December 16, 1986, at 5:00 p.m. at the law offices of Brown, Todd & Heyburn, P.L.L.C. (now Frost Brown Todd, LLC) in Louisville, Kentucky.

King instructed Pulliam to bring with him all of his shares of stock in Nelson Bancorp, Inc., which owned Peoples Bank; this constituted fifty percent of the total number of shares of Nelson Bancorp, Inc. King, Straus and Pritchett met with Pulliam and persuaded him (1) to execute a restitution agreement, (2) to surrender his certificates of stock in Nelson Bancorp, Inc. to King, and (3) to tender to King an option to purchase this stock for less than its actual value.

King, Straus and Pritchett also induced Pulliam (4) to sign a restitution agreement by which he covenanted to indemnify Peoples Bank for any losses it might sustain because of the certified checks which Pulliam had issued. Straus and Pritchett induced Pulliam to sign the restitution agreement which they had already prepared while Pulliam was without counsel by purporting to be his counsel. Tibbitts, Mirzaian, and Pulliam were subsequently convicted of bank fraud.

In February, 1988, Barnett Bank of Tampa, N.A. (hereafter "Barnett Bank") filed an action against Peoples Bank in Jefferson Circuit Court in Louisville, Kentucky. Barnett alleged that its loss had been $835,000.00. Neither Barnett Bank nor Peoples Bank impleaded Pulliam as a party to that action, although Peoples Bank had stated in its answer that Pulliam was a necessary and indispensable party. Through pre-trial discovery, Peoples learned that Barnett's actual loss had been only $633,500.00, rather than the amount set out in its pleading. However, neither Peoples nor Barnett advised the Jefferson Circuit Court of this fact, nor did Barnett amend its complaint to correct the error. In fact, Barnett resisted disclosing this fact to Peoples, and after being forced by court order to disclose the actual amount of its loss, Peoples and Barnett secured no fewer than five protective orders from the court

to insure that no one else would become aware of this fact.

After Barnett had been forced to disclose the true amount of its loss, Barnett and Peoples immediately began negotiations for settlement of the action. Peoples also filed a proof of loss claim with Ohio Casualty Insurance Company, through whom it was bonded.[5] Ohio Casualty participated fully in the settlement negotiations. Its counsel then repeatedly denied that Ohio Casualty had been a party to those negotiations.

Neither Peoples Bank nor Ohio Casualty offered to allow Pulliam to assume defense of the action. On Friday, April 14, 1989, less than a month after Barnett had been forced to reveal the actual amount of its loss, Ohio Casualty's Surety and Fidelity Claims Representative, William T .omas, Jones (hereafter "Jones") visited Pulliam at his insurance office at Chaplin, Kentucky and advised him that settlement negotiations were in progress. Jones then asked whether Pulliam would be interested in contributing to the settlement offer.

Pulliam asked Jones what settlement terms were being proposed, and Jones declined to disclose that information to Pulliam. When Pulliam indicated that he wished to defend the action, Jones terminated the discussion, and on the following Monday prepared a "Memo to File" which noted Pulliam's desire to defend the action and suggested that a better course would be for Ohio Casualty and Peoples State Bank to settle the action without allowing Pulliam to participate, and then recoup the entire amount of the settlement from Pulliam.

Pulliam, through his attorney, subsequently offered to contribute to any settlement offer, and was told that Ohio Casualty and Peoples would "get back to" him. Pulliam, accordingly, waited to receive further word concerning the settlement negotiations. Ohio Casualty and Peoples, however, concluded their settlement negotiations with Barnett Bank without further contacting Pulliam, who first learned of the settlement when he received a demand letter from Ohio Casualty asking him to reimburse Ohio Casualty for the amount of the settlement. Pulliam responded that he was under no obligation to repay Ohio Casualty, since he had not

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5. This proof of loss statement erroneously set out the amount of Barnett's loss as $835,000.00. Four months after filing the statement, Peoples learned that the actual amount of Barnett Bank's loss had only been $633,500.00. However, when Ohio Casualty filed suit against Pulliam in federal district court two years later, long after it had discovered the true amount of Barnett's loss, Ohio Casualty included this proof of loss statement containing the erroneous amount, as a part of its complaint.

agreed to the settlement terms.

Ohio Casualty then filed a collection action against Pulliam in the United States District Court for the Western District of Kentucky. That case came on for jury trial on June 30 - July 3, 1992. During the course of that trial, Peoples Bank's counsel, Charles F. Pritchett, Jr., appeared as a witness for Ohio Casualty, and testified that the total amount of Barnett Bank's loss had been $834,000.00, although he necessarily knew that the correct figure was $633,500.00.[6] Mr. Pritchett also stated that Barnett Bank had told him that the Video Communications stock which both Barnett and Peoples were holding as collateral, was "worthless", although Barnett had, in fact, provided him with documents showing that "Barnett brokerage" had estimated the stock's value at six million dollars.[7] As noted above, *see,* footnote 4, *supra,* the actual value of this collateral may have been as much as $120 million.

Mr. Pritchett also testified that Barnett had told him that a letter of credit executed by Prudential-Bache Securities in the amount of $700,000.00, which it had been holding as collateral, "was bogus", when Pritchett well knew that Barnett had not only insisted that the certificate of deposit was genuine, but had also collected $282,500.00 based, at least in part, on the genuineness of that certificate. Mr. Pritchett also testified that he did not know whether Prudential had any right of reimbursement against Barnett Bank when, in fact, he had in his possession a copy of the agreement between Prudential and Barnett and must necessarily have known whether or not it provided for reimbursement.

At the conclusion of the trial, the jury awarded judgment against Pulliam in the amount of $200,000.00. Pulliam subsequently, on October 17, 1995, filed a motion, pursuant to

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6. Barnett had claimed a loss of $835,000.00. In his testimony, Pritchett pointed out that Barnett had miscalculated, and that the figures it had alleged totaled $834,000.00, rather than $835,000.00. While noting this one thousand dollar discrepancy, Pritchett failed to advise the jury that Barnett had overstated the amount of its loss by some $201,500.00.

7. In this same document, Mr. Hacia, Assistant Vice President of Barnett Bank (hereafter "Hacka),also stated that the loss of Barnett's funds had been entirely his fault, due to his failing to follow Barnett Bank guidelines, and transmitting the funds to Peoples Bank before having received payment on the Excellence Land check from First Union Bank. **Hacia repeated this assertion at his deposition on December 7, 2002.** Hacia's admission against interest would obviously have been available to Peoples Bank, and to Pulliam, as a defense to the Jefferson Circuit Court action. Peoples, however, elected not to defend the action, and concealed this vital piece of exculparoty evidence from Pulliam, its indemnitor.

Rule 60(b), F.R.C.P., asking the court to set aside that judgment. The motion was denied by order dated October 7, 1996. Pulliam appealed that denial to the United States Court of Appeals for the Sixth Circuit, action No. 96-6522, *Warren L. Pulliam v. Ohio Casualty Insurance Company*. That court denied that appeal by order dated June 23, 1999. In its opinion, the court stated:

> Plaintiff failed to explain the lengthy delay, and **he failed to produce evidence** to support his extraordinary motion. In fact, Plaintiff conceded that he could not prove the fraud he alleged.

Order of 6/23/99 (emphasis added).

Pulliam inferred from the Court's statement that, if he **had** been able to prove the fraud which he had alleged, he would have prevailed. Pulliam, therefore, sought to obtain the evidence necessary to prove his case. In April, 1997, Pulliam and his co-defendants in the Nelson Circuit Court action (Petitioners here) filed a RICO action against Ohio Casualty, the Prudential defendants, and Barnett Bank in the United States District Court for the Middle District of Florida, action # 97-CV-846,*Warren L. Pulliam, et al. v. Ohio Casualty Insurance Company, et al.*

In their complaint, the plaintiffs alleged that Barnett "had entered into a settlement agreement with Defendant Prudential" and that when Barnett had subsequently sued Peoples State Bank for the entire amount of its loss, Barnett had been "attempting to obtain a double recovery." However, beyond the bare allegation that the plaintiffs believed there had been such a settlement, they were unable to plead any specific facts to support that claim.

Both Prudential and Ohio Casualty moved to dismiss the Florida complaint for failure to state a claim upon which relief could be granted. Among the grounds urged for dismissal, Prudential and Ohio Casualty argued that the plaintiffs had failed to allege sufficient facts. Plaintiffs thereupon agreed to a voluntary dismissal without prejudice to reinstate their cause of action at a later date. This order was entered on October 14, 1997.

Ohio Casualty had, in the meantime, filed a collection action in Nelson Circuit Court, 93-CI-00130, *Ohio Casualty Insurance Co. v. Warren L. Pulliam, et al.* In addition to Warren L. Pulliam, Ohio Casualty named as parties defendant Pulliam's wife, his son, his insurance agency, an employee of that agency, Paul A. Sims, and Pulliam's corporation, W & J Pulliam, Inc.

Pulliam and his co-defendants in that case (the instant

Petitioners) undertook extensive discovery, which was vigorously resisted by Ohio Casualty. As a result, although that case has now been pending for more than thirteen years, and has been vigorously litigated by the defendants (Plaintiffs here), it has not yet come to trial. On July 14, 2000, after a year-long fight in which Ohio Casualty resisted the defendants' request for production of documents, Ohio Casualty provided a large number of documents which had not previously been available to the defendants (Plaintiffs here). These documents showed conclusively that Ohio Casualty and Peoples State Bank had, in fact, been guilty of fraud and collusion to settle the Jefferson Circuit Court action to Pulliam's detriment, without securing his consent to the settlement terms, and to then force him to pay the full amount of that judgment.

In 1999, when they requested the production of documents, Pullliam and his co-defendants had noticed the deposition of Ohio Casualty's designated representative, for the purpose of verifying and explaining the documents thus produced. This notice of deposition was opposed, by various means, and it was not until nearly two years after the production of documents, and nearly three years after the deposition had first been noticed, that Ohio Casualty's designated representative appeared and was asked to verify the documents thus produced.

However, when Ohio Casualty's designated representative, Thomas Caldwell, finally sat for deposition on April 17, 2002, he testified that he had **no** knowledge whatever about the matters concerning which he had been subpoenaed to testify; nor did he provide any documents in response to the subpoena *duces tecum* which had been served upon Ohio Casualty. He was, consequently, unable to authenticate the documents which Ohio Casualty had provided in document production nearly two years earlier. However, the defendants (Petitioners here) had also subpoenaed Mr. Caldwell's predecessor as Fidelity and Surety Claims Manager, William Thomas Jones, and Mr. Jones was able to verify and explain many of the documents.

After taking these depositions, the Petitioners then moved Nelson Circuit Court for leave to file a counterclaim against Ohio Casualty, based upon the new evidence which had been provided by Ohio Casualty, and to implead the other instant Respondents as third party defendants in the Nelson Circuit Court action. Hon. Larry Raikes, Nelson Circuit Judge, denied the Motion and indicated that the matter ought to have been brought as a separate action. The Petitioners, accordingly, filed the instant action in Nelson Circuit Court.

As noted above, the Respondents removed the action to the United States District Court for the Western District of Kentucky, and moved to dismiss the action for failure to state a claim upon which relief could be granted, and for summary judgment. That court dismissed the federal counts, and remanded the state counts to Nelson Circuit Court. This appeal followed.

REASONS FOR GRANTING THE WRIT

1. Plaintiffs' claims are not time-barred.

Judge Coffman held that the Plaintiffs' RICO claims were barred by the applicable statutes of limitation. Her reasoning on this point was as follows:

> The plaintiffs argue that they were not aware of the facts allegedly concealed by the defendants until after receiving documents from Ohio Casualty during discovery. The fact that was allegedly concealed is that Prudential reimbursed Barnett in the amount of $282,500 prior to Barnett's 1989 complaint against Peoples; the plaintiffs allege that this payment demonstrates that Barnett had already recovered its damages from the Tibbitts fraud and that the suit against Peoples was an attempt to obtain a double recovery for its injuries. The plaintiffs allege that this fact would have provided Peoples and Pulliam a defense to the Barnett claim and that it would have provided Pulliam with a defense to the 1990 Ohio Casualty suit.
>
> If the plaintiffs had not discovered that Barnett had been reimbursed by Prudential until after the document production in 2000, their RICO claims would not be barred by the statute of limitations. The plaintiffs, however, were aware of the settlement between Prudential and Barnett when they filed a complaint against Ohio Casualty, Barnett, and the Prudential defendants in April 1997. The plaintiffs specifically alleged the following in paragraph 26w of the Tampa complaint:

> The fact that Defendant Ohio Casualty knew or should have known that Defendant Barnett Bank had entered into a settlement agreement with Defendant Prudential, and that Peoples had alleged in the underlying action, that Defendant Barnett Bank had already received restitution from Defendant Prudential and was attempting to secure "a double recovery from Peoples Bank."

The Tampa complaint demonstrates that the plaintiffs had actual knowledge of the Prudential-Barnett settlement in April 1997. *See New England Health Care Employees Pension Fund,* 336 F.3d at 501-02 (finding that prior complaint demonstrated either actual or constructive knowledge of fraud for purpose of dismissal under Rule 12(b)(6) motion and statute of limitations). While the plaintiffs may not have known the exact amount of the settlement until 2000, the plaintiffs did know that Prudential had paid Barnett some amount.

Because the plaintiffs discovered their injury in April 1997 at the latest, any claim for a RICO injury arising before that time became barred by the statute of limitations in April 2001. The instant action, however, was not filed until November 2002. Because the statute of limitations is four years, the plaintiffs are barred from pursuing a RICO claim for any injury that was discovered or should have been discovered by November 1998.

Order at 27-29 (emphasis added).[8]

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8. As noted above, Ohio Casualty and Prudential moved to dismiss the Florida action on the grounds that it did not allege sufficient facts to state a claim. In the instant action, they argued, and Judge Coffman agreed, that the facts set out in the Florida action had been fully adequate to state a claim for RICO violations. **The defendants should not have been allowed to "have it both ways."** Having

Respectfully, Plaintiffs insist that Judge Coffman misapprehended the law on this point. It is elementary that limitation does not run where the cause of action has been fraudulently concealed by the defendant and is not discovered by the plaintiff until after the statutory period has expired. *Pan American Petroleum Corp. v. Orr*, 319 F.2d 612, 614 n. 7 (5th Cir. 1963). This equitable doctrine, known as the "discovery rule," is to be applied circumspectly on a case-by-case basis. When doing so,

> the court must identify, evaluate, and weigh the interests of the opposing parties, balancing the hardship on the plaintiff caused by the bar of his suit against the burden on the defendant to obtain proof of his defense.

Pan American Petroleum Corp. v. Orr, 319 F.2d 612, 614 n. 7 (5th Cir. 1963).

The holding of the Sixth Circuit, *New England Health Care Employees Pension Fund v. Ernst & Young*, 336 F.3d 495 (6th Cir. 2003), cited by Judge Coffman (Opinion at 28), is instructive in this regard. Judge Nelson, writing for the Court, explained:

> Before we turn to the application of § 9(e) [of the Securities Exchange Act of 1934, 15 U.S.C. § 78] to the facts of this case, we need to consider when the limitations period begins to run under an "inquiry notice" standard. Ernst suggests that the limitations period is triggered when the plaintiff learns facts that would cause a reasonable investor to investigate the possibility of fraud. Some cases support that suggestion. The majority view, however, is that knowledge of suspicious facts – "storm warnings," they are frequently called – merely triggers a duty to investigate, and that **the limitation period begins to run only when a reasonably diligent investigation would have discovered the fraud.** This view, we believe, reflects an appropriate balance between "the staunch federal interest in requiring plaintiffs to

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argued in the Florida action that the facts alleged there were inadequate to state a claim, and having obtained the plaintiffs' acquiescence to that opinion, the Defendants should not have then been permitted to argue the converse in the Kentucky action.

> bring suit promptly . . . and the equally strong interest in not driving plaintiffs to bring suit . . . before they are able, in the exercise of reasonable diligence, to discover the facts necessary to support their claims." We conclude, in accordance with the majority view, that the § 9(e) limitations period begins to run when a plaintiff should have discovered, by exercising reasonable diligence, the facts underlying the alleged fraud.

New England Health Care Employees Pension Fund v. Ernst & Young, 336 F.3d at 501 (citations omitted).

When they filed the Tampa action in 1997, **the Plaintiffs had learned**, from the trial testimony of Charles F. Pritchett, Jr., Esq., the bare fact that Barnett Bank and Prudential had reached a settlement, and that Barnett Bank had been paid an undisclosed sum pursuant to that agreement. At the trial, Mr. Pritchett declined to disclose the amount paid, and Judge Johnstone did not require him to do so. The Plaintiffs also knew that Peoples Bank's counsel, Mr. Pritchett, had argued in a Motion to Compel Production of that settlement agreement, that this sum might be available to Peoples as a set-off against the amount Barnett was seeking to recover.[9]

However, since the Jefferson Circuit Court action was settled pursuant to an agreement of the parties, who then obtained no fewer than five separate protective orders to assure that no one else (including Warren Pulliam, from whom Peoples Bank and Ohio Casualty intended to seek a full recovery) could gain access to that settlement agreement, the Plaintiffs were not able to ascertain whether the sum recovered from Prudential by Barnett Bank was, in fact, available as a set-off for the amount which Barnett had sought to recover from Peoples. The Plaintiffs had obtained only enough information to make it appear possible that such was the case.

The Sixth Circuit's holding in *New England Health Care* makes it clear that such a quantum of information does not suffice

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9. In that memorandum, Pritchett further stated that Barnett Bank's counsel had asked him **"to breach his ethical obligation" to his client**, Peoples Bank, by offering to show him a copy of the Prudential-Barnett settlement, on condition that Pritchett not disclose the terms of that agreement to his client. Of course, Pritchett's allegation is further evidence that Barnett Bank was attempting to obtain a collusive settlement in violation of the rights of Peoples Bank and its indemnitor, Warren Pulliam.

to trigger the running of limitations. As one treatise has succinctly noted: "There must be more than mere suspicion." CALVIN W. CORMAN, LIMITATION OF ACTIONS § 11.51 at n. 10 (1991), *citing, L.C.L. Theatres v. Columbia Pictures Indus.*, 566 F.2d 494, 497 (5th Cir. 1978).

The facts of which the Plaintiffs were aware in April, 1997 were, in the words of the Sixth Circuit, "storm warnings" which clearly placed the Plaintiffs on inquiry notice. The Plaintiffs did, in fact, undertake a diligent inquiry. **Both Prudential's attorney, William W. Allen, Esq., and Ohio Casualty's attorney, Timothy D. Martin, Esq., asserted that no such agreement existed.**[10] This concealment prevented the Plaintiffs from discovering sufficient facts to state a cause of action until July 14, 2000, when Ohio Casualty finally produced a copy of the settlement agreement; and it prevented the Plaintiffs from verifying the authenticity of the documents until April 17. 2002.[11]

Such concealment, which prevents a plaintiff from discovering the necessary facts despite his having made a reasonable investigation, clearly tolls the running of the statute of limitations.

> Under the federal equitable tolling doctrine, concealment of fraudulent conduct tolls the running of the statute of limitations in favor of the defrauded party until that party learns of the fraudulent conduct of the opposing party, provided the defrauded party could not have discovered it at an earlier date by the exercise of reasonable diligence.

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10. As the Court will note, these attempts to mislead the Plaintiffs by concealing Ohio Casualty's participation in the settlement negotiations continued until at least October. 1999. Ohio Casualty's counsel repeated these assertions to the Nelson Circuit Judge, Hon. Larry Raikes, in open court at a hearing conducted on February 1, 2000.

11. Judge Coffman evidently believed that, to trigger running of the statute, it was only necessary that the Plaintiffs discover **that they had been injured**. "Because the plaintiffs **discovered their injury** by April 1997 at the latest, any claim for a RICO injury arising before that time became barred by the statute of limitations in April 2001. (Order at 29). The Sixth Circuit, however, has stated that the "limitations period begins to run when a plaintiff should have discovered, by exercising reasonable diligence, the **facts underlying the alleged fraud**. 336 F.3d at 501.

. . . . . .

> **Active concealment** frequently increases the difficulty of discovery, thereby justifying the aggrieved party's failure to learn of the fraud at an earlier date. The standard for discovery also is mitigated by the defendant's greater knowledge of the transaction or greater access to information or **by a fiduciary relationship between the parties.**[12]

CORMAN, *supra*, § 11.5.1 at nn. 13, 16-18.

This discovery rule has been specifically applied to RICO actions. *Coal-Mac, Inc. v. JRM Coal Co., Inc.*, 743 F. Supp. 499, 501 (E.D. Ky. 1990)(to trigger running of statute, plaintiff must "discover facts sufficient to make him aware that is was a RICO injury.")

Judge Coffman erroneously held that the Plaintiffs' cause of action accrued when they discovered that they had been injured. Such, however, is not the law. A cause of action only accrues when the plaintiff has discovered sufficient facts underlying the injury to enable him to state a cause of action. The Plaintiffs' cause of action did not accrue until they were able to verify the authenticity of the documents which Ohio Casualty had provided in discovery. As shown above this did not occur until Ohio's designated representative, Thomas Caldwell, and his predecessor, William Thomas Jones, gave their depositions on April 17, 2002.

Since the instant action was filed on November 13, 2002, less than one year after the Plaintiffs' cause of action accrued, the instant Complaint was timely filed.

Plaintiffs raised this point in their appeal to the Sixth Circuit. In its opinion, however, the court below stated:

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12. King stood in a fiduciary relationship to Pulliam by virtue of the fact that he had, at the time in question, been Pulliam's C.P.A., Pulliam's wife's C.P.A. the bank's C.P.A. and C.P.A. for Chaplin Insurance Agency, Inc.; Ohio Casualty stood in fiduciary relationship to Pulliam since he was their intended indemnitor; and Prudential stood in fiduciary relationship to Pulliam because he was one of the personal investors who had been defrauded by Prudential's agents. So stated both investigators of Prudential, James Waddell and Bruce Wright. This tends to show conspiracy and fraud. Jefferson Circuit Court sealed some evidence in the underlying action. This is the reason that Judge Coffman found Plaintiffs had stated a claim for violation of the Unfair Claims Settlement Practices Act in her Order of September 25, 2003.

> As this court has held, "the running of the statute of limitations begins when a plaintiff is put on inquiry notice - that is, when the plaintiff has been presented with evidence suggesting the possibility of fraud." *Isaak v. Trumbull Sav. & Loan Co.*, 169 F.3d 390, 399 (6th Cir. 1999). A plaintiff need only be aware of "storm warnings" but does not need to "hear[] thunder and see[] lightning."

(Opinion, at 5).

Assuming, *arguendo*, that Judge Gibbons has correctly read *Isaak v. Trumbull*, there is an obvious conflict between that holding and the court's subsequent holding in *New England Health Care*. This Court's holding in *New England Health Care* makes it clear that "evidence suggesting the possibility of fraud," 169 F.3d 399, does not suffice to trigger the running of limitations. As noted above: "**There must be more than mere suspicion.**" CALVIN W. CORMAN, LIMITATION OF ACTIONS § 11.51 at n. 10 (1991), *citing*, *L.C.L. Theatres v. Columbia Pictures Indus.*, 566 F.2d 494, 497 (5th Cir. 1978).

The Sixth Circuit's opinion in the instant case obviously creates a conflict between the instant holding and its prior holding in *New England Health Care*, and also produces a conflict between the Sixth Circuit and the Fifth Circuit's holding in *L.C.L. Theaters*. This Court should accept certiorari in order to resolve this split in the circuits, and between the Sixth Circuit's own holdings.

2. The panel was improperly constituted.

At oral argument, after the Appellants' counsel had concluded her presentation, and as Appellees' counsel was beginning her presentation, Hon. Gordon Quist, United States District Judge for the Western District of Michigan, sitting by appointment, advised the parties and counsel that he owned stock in Bank of America, but had not realized that the Bank of America had acquired Barnett Bank of Tampa, N.A., one of the Defendants/Appellees. The Court's opinion then noted, in a footnote:

> The Honorable Gordon J. Quist, United States District Judge for the Western District of Michigan, was present for oral argument, but

> subsequently recused himself from this case. He took no part in the court's consideration of decision of the case.

Order, at 1.

It was not until the parties received the court's written opinion that they learned Judge Quist had recused himself from the case.

28 U.S.C. § 46 (b) provides, in pertinent part:

> In each circuit the court may authorize the hearing and determination of cases and controversies by separate panels, each consisting of three judges, at least a majority of whom shall be judges of that court, unless such judges cannot sit because recused or disqualified.

A subsequent section of that chapter, 28 U.S.C. § 46 (d) provides:

> A majority of the number of judges authorized to constitute a court or panel thereof . . . shall constitute a quorum.

As used in § 46 (d), "Quorum means such a number of the members of the court as may legally transact judicial business." *Tobin v. Ramey*, 206 F.2d 505, 507 (5th Cir. 1953). Moreover, it is well settled that a quorum of the panel may proceed to judgment when one member of the panel dies or is disqualified. *United States v. Allied Stevedoring Corp.*, 241 F.2d 925, 927 (2d Cir. 1957)(L. Hand, J.)

Such has been the law from the beginning of the circuit courts of appeal; *see*, Act of Mar. 3, 1911, ch. 6, § 117, 36 Stat 1131 ("There shall be in each circuit a circuit court of appeals, which shall consist of three judges, of whom two shall constitute a quorum"); Ch. 517, § 2, 26 Stat. 826 ("There is hereby created in each circuit a circuit court of appeals, which shall consist of three judges, of whom two shall constitute a quorum").

Shortly after the creation of the circuit courts of appeal, this Court was called upon to construe the meaning of the foregoing statutory language. In *Moran v. Dillingham*, 174 U.S. 153 (1899), this Court addressed a case in which a judge on the court of appeals was statutorily disqualified because of his

participation in the lower court proceedings. The Court held that the appellate decree in which he took part, even if not absolutely void, had to be set aside and quashed without regard to its merits, and the case had to be remanded to the court of appeals for a hearing and determination according to law by a bench of competent judges.

Fourteen years later, this Court faced a similar problem in *William Cramp & Sons Ship & Engine Bldg. Co. v. International Curtis Marine T. Co.*, 228 U.S. 645 (1913). The Court reversed and remanded the case to the court below, so that the case could be heard by a competent court conformably to statutory requirements. The Court noted that it was required to remand the case so that the court of appeals could properly discharge the duty cast upon it by law, since the court below had committed reversible error. This error, it stated, resulted from the fact that the court of appeals which passed upon the case was virtually no court at all, because it had not been organized in conformity to law.

Even earlier, in *American Constr. Co. v. Jacksonville, T. & K. W. R. Co.*, 148 U.S. 372 (1893), this Court noted that if the statutory disqualification prohibited a judge from sitting on the court of appeals in a particular case, the resulting appellate decision was unlawful and should be set aside.

To the same effect are *United States v. American-Foreign S.S. Corp.*, 363 U.S. 685 (1960); *United States v. Emholt*, 105 U.S. 414 (1881); *Nelson v. Carland*, 11 L. Ed. 126 (1843); and *United States v. Lancaster*, 5 L. Ed. 127 (1820). In all of these cases, this court noted that it was authorized to vacate the judgment entered by an improperly constituted court of appeals, even when there was a quorum of judges competent to consider the appeal.

Only three years ago, this Court was confronted with a similar case. *Nguyen v. United States*, 539 U.S. 69 (2003). That case arose when a panel of the Ninth Circuit erroneously included a judge whom the Court determined was an Article I judge rather than an Article III judge. 539 U.S. at 74-76. The Court then stated that its decision was "driven . . . by a concern . . . for the validity of the composition of the Court of Appeals." 539 U.S. at 81.

The Court then stated:

> [T]he statutory authority for courts of appeals to sit in panels requires the inclusion of at least three judges in the first instance. . . It is clear that the statute was not intended to preclude disposition by a panel of two judges in the event that one member of a three-judge panel to which the appeal is

> assigned becomes unable to participate, but it is less clear whether the quorum statute offers postjudgment absolution for the participation of a judge who was not otherwise competent to be part of the panel . . . Thus, although the two Article III judges who took part in the decision of petitioners' appeals would have constituted a quorum if the original panel had been properly created, it is at least highly doubtful whether they had any authority to serve by themselves as a panel. In the light of that doubt, it is appropriate to return these cases to the Ninth Circuit for fresh consideration of petitioners' appeals by a properly constituted panel organized conformably to the requirements of the statute.

Nguyen v. United States, 539 U.S. at 82-83 (citations and internal quotations omitted).

Since the rendition of this opinion by this Court, there have been no reported decisions by the lower courts construing and explaining the meaning of the foregoing language. As Appellants understand the holding of *Nguyen,* 28 U.S.C. § (d) protects the integrity of a decision rendered by two judges of a three-judge panel, when the panel as originally constituted was legally qualified. However, if one of the three judges was not legally qualified to serve at the time he was appointed to the case, any decision rendered by the two remaining judges is *coram non judice,* since the panel as originally constituted had not been organized according to law.

Applying this rule to the facts of the case at bar, it is clear that the decision rendered by the panel cannot stand. Although the court's written opinion does not state the reason for Judge Quist's recusal, reference to the tape of the proceedings will show that this recusal was, in fact, due to a perceived conflict of interest, since he was a stockholder in one of the defendant corporations. Although Judge Quist, and the parties, may not have become aware of this fact until midway through the oral argument, the disqualification obviously existed at the time he was appointed to hear the case.

The court stated that Judge Quist "took no part in the court's consideration or decision of the case." (Order, at 1). With all due respect, Petitioners submit that, while Judge Quist may well have refrained from participating in the post-argument analysis, it was not until after Appellants' counsel had presented her

argument-in-chief, and Appellees' counsel was beginning her presentation, that Judge Quist advised the parties and their counsel of apparent conflict of interest; and they were not advised of the fact he had recused himself until they received the court's written opinion. Is it contended that Judge Quist "took no part" simply because he did not happen to ask a question of Appellants' Counsel during the presentation of her case in chief?

Appellants submit that, under the doctrine announced in *Nguyen,* this case was inadvertently assigned to an improperly constituted panel, which in the words of *William Cramp & Sons*, constituted "virtually no court at all." Appellants reiterate, it would be quite another matter if Judge Quist had been properly qualified at the time he was appointed to the panel, and thereafter become disqualified; in such case, 28 U.S.C. § 46 (d) would "absolve" the quorum of any error. The conflict of interest, however, admittedly existed at the time the panel was appointed, even though Judge Quist and the parties may not have been aware of it until during the oral arguments. The decision of the panel is void *ab initio,* and must be vacated.

The case authority cited by the court below in its amended order is not to the contrary. Petitioners believe that each of these cases, properly construed, involved a case in which the third judge of the panel was properly qualified at the time the panel was appointed, but became disqualified thereafter. In the instant case, however, Judge Quist's conflict of interest obviously existed at the time the panel was appointed, even though he may not have been aware of it at that time.

The instant case, therefore, is analogous to those cases in which one member of the panel did not meet the statutory qualifications at the time the panel was appointed, rather than to the cases cited by the court below. Such being the case, the panel which heard the instant appeal was, in the words of this Court, "no court at all," and its holding was and is void *ab initio.*

3. Plaintiffs have pled a claim for RICO.

Judge Coffman also held that the Plaintiffs had failed to state a claim for violation of the RICO statute. She stated that the RICO counts were deficient in several respects. First of all, Judge Coffman noted, correctly, that Plaintiffs had failed to indicate under which subsection of 18 U.S.C. § 1962 they were proceeding. Plaintiffs respond that their complaint states a claim for violation of all three applicable sections of the RICO statute, *i.e.*, 18 U.S.C. § 1962 (a), 18 U.S.C. § 1962(b), and 18 U.S.C. § 1962(c). If Judge

Coffman had believed it essential that each subsection be explicitly identified, Plaintiffs should have been granted leave to amend their Complaint in this regard.

Second, Judge Coffman also stated that:

> The person accused of the violation and the enterprise must be separate and distinct entities . . . In order to state a claim under RICO, the plaintiff must allege that a defendant participates in the conduct of affairs of an enterprise that is separate froim the defendant itself. A corporation does not violate RICO by participating in the conduct of its own affairs.

Order, at 10, 12.

Judge Coffman was only partially correct. While the rule set out in her Opinion is applicable to RICO claims predicated upon subsection (c) of § 1962, cases grounded on subsections (a) and (b) of § 1962 do not require a stringent separation of the guilty person and the enterprise. PAUL A. BATISTA, CIVIL RICO PRACTICE MANUAL § 5.11 at n. 53 (2d ed. 1997); *see, Busby v. Crown Supply, Inc.*, 896 F.2d 833 (4th Cir. 1990)("Unlike subsection (c), which requires the relationship between the 'person' and the 'enterprise' (i.e., employer-employee), subsection (a) requires only the use of an 'enterprise' by a 'person.' . . . [T]he offender and the enterprise need not be separate."); *Official Publications, Inc. v. Kable News Co.*, 884 F.2d 664 (2d Cir. 1989)("under § 1962(a), it may be possible for a defendant to be the enterprise").

In *Landry v. Air Line Pilots Ass'n*, 901 F.2d 404 (5th Cir. 1990), the court stated that:

> In contrast to the language of subsection (c) which 'requires a relationship between the "person" and the "enterprise," ' subsection . . . (b) require[s] only the *use* of an "enterprise" by a "person." Thus the RICO person and the enterprise need not be distinct for a person to be held liable under subsection (b).

Landry v. Air Line Pilots Ass'n, 901 F.2d at 425 (emphasis by court).

Moreover, in *Schreiber Distrib. Co. v. Serv-Well Furniture Co.*, 806 F.2d 1393 (9th Cir. 1986), the Ninth Circuit held that the "person" may also be the "enterprise" under either section 1962(a) or (b) if it is also "the direct or indirect beneficiary of the pattern of racketeering activity." 806 F.2d at 1398. Since Plaintiffs have stated a claim under all three sections of the RICO Act, they were not required to allege an "enterprise" separate from the "person," in pleading violations of subsections (a) and (b) of 18 U.S.C. § 1962.

Third, Judge Coffman stated that the Plaintiffs had not asserted that the "enterprise" had a sufficient structure to satisfy the definition found in 18 U.S.C. § 1961(4):

> If the enterprise is not a legally recognized entity, then the plaintiffs must allege an association-in-fact. "To satisfy the enterprise requirement, an association-in-fact must be an ongoing organization, its members must function as a continuing unit, and it must be separate from the patten of racketeering activity in which it engages. Some sort of organizational structure or chain of command is required; this takes simple conspiracies out of the scope of RICO.

Order, at 10 (citations omitted)

Respectfully, Plaintiffs insist that Judge Coffman is mistaken, and that she misread the RICO statute on this point. As noted above, these requirements apply only to subsection (c) of 18 U.S.C. § 1962; they have no applicability to complaints based upon the violation of subsections (a) and (b). Moreover, Plaintiffs have alleged that each of the various corporations, namely, Peoples State Bank, Nelson Bancorp, Inc., Prudential Insurance Company of America, Prudential-Bache Securities, Inc., Barnett Bank of Tampa, N.A., First Union Bank, and the U.S. Mortgage & Trust Co.,Inc., is an "enterprise." These banks and corporations obviously are "legally recognized entities" and, therefore, satisfy the foregoing requirements.

As to the allegation that the various associations-in-fact have violated subsection (c) of the RICO Act, Plaintiffs submit that the requirement is not so rigid as Judge Coffman asserts. This Court explained this point in *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479 (1985). Wrote the Court:

A violation of § 1962(c), the section on which

> Sedima relies, requires (1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity. The plaintiff must, of course, allege each of these elements to state a claim. Conducting an enterprise that affects interstate commerce is obviously not a violation of § 1962, nor is mere commission of the predicate offenses. In addition, the plaintiff only has standing if, and to the extent that, he has been injured in his business or property by the conduct constituting the violation.
>
> But the statute requires no more than this. Where the plaintiff alleges each element of the violation, the compensable injury necessarily is the harm caused by predicate acts sufficiently related to constitute a pattern, for the essence of the violation is the commission of those acts in connection with the conduct of an enterprise. Those acts are, when committed in the circumstances delineated in § 1962(c), "an activity which RICO was designed to deter." Any recoverable damages occurring by reason of a violation of § 1962(c) will flow from the commission of the predicate acts.

Sedima, S.P.R.L. v. Imrex Co., 473 U.S. at 496 - 97.

Since "the statute requires no more than this," it is obvious that simple and literal compliance with this relatively straightforward charter for the pleading of a civil racketeering claim is sufficient to state a complaint that will survive a dismissal motion. As *Sedima* teaches, in order to state a claim, the pleader must allege an "enterprise." Section 1961(4) provides that the term " 'enterprise' includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity." This language is expansive; the word "includes" renders the statutory listing illustrative, not exhaustive. *U.S. v. Hiber*, 603 F.2d 327 (2d Cir. 1979)("The definition of 'enterprise' is a list beginning with the word 'includes.' This indicates that the list is not exhaustive but merely illustrative"). The term is liberally interpreted. *U.S. v. Masters*, 924 F.2d 1362 (7th Cir. 1991)("The statute says 'enterprise includes' not 'enterprise means.' The point of the definition is to make it clear that it need not be a formal enterprise.").

Judge Coffman also stated that the Plaintiffs were required to plead their fraud allegations with specificity pursuant to the requirements of Rule 9(b), F.R.C.P. "Rule 9(b) of the Federal Rules of Civil Procedure requires fraud claims to be pled with particularity. This pleading requirement applies to fraud claims under RICO." Order, at 13. She notes, however, that: "Rule 9(b) does not apply to the Hobbs Act claims." *id.*

As shown above, the Plaintiffs have alleged that Defendants violated the RICO Act by committing extortion, in violation of the Hobbs Act, 18 U.S.C. § 1951. They clearly were not required to plead these claims with the specificity required by Rule 9(b), F.R.C.P. "Where fraud lies at the core of the action, Rule 9(b) applies." *Hayduk v. Lanna,* 775 F.2d 441, 443(1st Cir. 1985). However, conspiracy claims not based upon fraud "are governed by the more liberal pleading requirements of Federal Rule of Civil Procedure 8 rather than Rule 9(b)." *Id.* Plaintiffs readily concede that RICO violations based on fraud must be pleaded with the same particularity that is required in pleading fraud. They insist, however, that this rule does not apply to RICO complaints based on the predicate offense of extortion, such as the case at bar.

A court "will not scrutinize non-fraud RICO allegations of the Complaint against a heightened particularity standard." *U.S. v. Bonnano Organized Crime Family,* 683 F. Supp. 1411, 1428 (E.D. N.Y. 1988). As one federal court has explained:

> [T]he exceptional mandate of Federal Rule of Civil Procedure 9(b) that allegations of fraud and mistake be pleaded with particularity is inapplicable to RICO actions that do not involve claims of fraud.

U.S. v. Private Sanitation Industry Assn., 793 F. Supp. 1114, 1124 (E.D. N.Y. 1992).

A RICO claim which is based on extortion as the predicate act, does not fall under the coverage of Rule 9(b), F.R.C.P.

> Pavlovic and Franey also challenge the allegations against them as inadequate for pleading fraud with particularity under the requirements of Fed.R.Civ.P. 9(b). However, this challenge is misplaced since the predicate acts alleged, while sounding in fraud, are based on federal and state statutes with specific proscriptions against

> extortionate and other illegal conduct, not on the mail or wire fraud statutes which normally invoke the pleading requirements of Rule 9(b) in the context or RICO.

National Elec. Benefit Fund v. Heary Bros., 931 F. Supp. 169, 191 (W.D. N.Y. 1995).

Since allegations of extortion do not trigger the provisions of Rule 9(b), the Plaintiffs were not required to plead their Complaint for extortion with particularity.[13] The Court, therefore, should reinstate the Plaintiffs' RICO counts.

4. Defendants Horn and U.S. Mortgage & Trust were properly served.

A matter which was left unresolved by the trial court is the question of whether Defendants J.R. Horn a/k/a Marion A. Horn, Jr. and the United States Mortgage and Trust Company, Inc., were adequately served with process. This mater was raised by the Plaintiffs in their Motion to Remand. However, the court did not find it necessary to decide the question at that time, and she subsequently failed to revisit the matter. Consequently, it is unclear whether Defendants J.R. Horn and U.S. Mortgage and Trust Company, Inc., were before the appellate court.

Plaintiffs submit that these two parties Defendant were adequately served with process. Service of process was made upon J.R. Horn on November 16th, 2002, by certified mail. The summons and complaint were sent restricted delivery, as required by CR 4.01(1)(a). Procedss was accepted by "Elaine Horn, POA." This service clearly complied with the requirements of CR 4.04(2), which provides:

> (2) Service shall be made upon an individual within this Commonwealth, other than an unmarried infant or person of unsound mind, by delivering a copy of the summons and of the complaint (or other initiating document) to him personally or, if acceptance is refused by offering personal delivery to such person, or by delivering a copy of the summons and of the complaint (or

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13. Moreover, if she believed that the Complaint lacked the requisite particularity, Judge Coffman should have permitted the Plaintiffs to amend their Complaint and cure the defect, rather than dismissing it outright.

> other initiating document) **to an agent authorized by appointment** or by law to receive service of process for such individual.

Since Elaine Horn was power of attorney for J.R. Horn, she obviously was "an agent authorized by appointment . . . to receive service of process for such individual." *U.S. v. Balanovski,* 236 F.2d 298 (2d Cir. 1956)(one acting under poser of attorney may accept service of process); *New England Reinsurance Corp. v. Tennessee Insurance Co.,* 780 F. Supp. 73, 78 (D. Mass. 1991); *U.S. v. Davis,* 38 F.R.D. 424 (N.D. N.Y. 1965). Therefore, service was properly effected upon Defendant J.R. Horn.

Service of process was also made upon Defendant U.S. Mortgage and Trust Co., Inc. on or about November 17, 2002, via certified mail. The summons and complaint were sent restricted delivery as required by CR 4.01(1)(a). Process was accepted by "Elaine Horn, POA." This service clearly complied with the requirements of CR 4.04(5), which provides:

> (5) Service shall be made upon a corporation by serving **an officer** or managing agent thereof, or the chief agent in the county wherein the action is brought, or any other agent authorized by appointment or by law to receive service on its behalf.

Ms. Horn is the Vice President of U.S. Mortgage & Trust Co., Inc. Thus, she clearly was "an officer" of the corporation and, as such, was authorized to accept service of process on its behalf. *Pioneer Utilities Corp. v. Scott-Newcomb, Inc.,* 26 F. Supp. 616, 618 (E.D. N.Y. 1939)(service on vice-president of corporation is service on "an officer of the corporation"); *see, In re. Grieb Printing Co.,* 230 B.R. 539, 541 (Bkrtcy. W.D. Ky. 1999)(signature of corporate officer binds corporation).

As the Sixth Circuit held in *Tech Hills II v. Phoenix Home Life Mutual Ins. Co.,* 5 F.3d 963 (6th Cir. 1993): "A complaint is considered received by a corporation when it is received by an agent authorized to accept service of process." 5 F.3d at 968.

CONCLUSION

As shown above, the judgment of the United States Court of Appeals by which it dismissed the appeal of the Petitioners was contrary to law and must be reversed. The Court, therefore, should

grant Certiorari to the United States Court of Appeals for the Sixth Circuit and, upon hearing, should remand the action with directions that the Petitioners' cause of action be reinstated. Petitioners pray for an Order of the Court so holding.

Respectfully submitted,

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